

Dallas & Mavis Forwarding Company, Inc and General Teamsters, Sales and Service and Industrial Union, Teamsters Local 654, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO¹ Cases 9-CA-24472 and 9-CA-24642

November 30 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
JOHANSEN AND CRACRAFT

On June 16 1988 Administrative Law Judge Robert A. Giannasi issued the attached decision. The Charging Party and the General Counsel each filed exceptions and a supporting brief. The Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three member panel.

The Board has considered the decision and the record in light of the exceptions² and briefs and has decided to affirm the judge's rulings findings and conclusions and to adopt the recommended Order as modified.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent Dallas & Mavis Forwarding Company Inc Springfield Ohio its officers agents successors and assigns shall take the action set forth in the Order as modified.

Substitute the following for paragraph 2(c)

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply

¹ On November 1 1987 the Teamsters International Union was readmitted to the AFL-CIO. Accordingly the caption has been amended to reflect that change.

² The Charging Party and the General Counsel have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products* 91 NLRB 544 (1950) enf'd 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Deborah Jacobson Esq. for the General Counsel
C. John Holmquist Jr. Esq. and *Linda G. Burwell Esq.*
(Butzel Keidan Simon Myers & Graham) of Bloomfield Hills Michigan for the Respondent
William O. Puncer Esq. (*Logothetis & Pense*) of Dayton Ohio for the Charging Party

DECISION

STATEMENT OF THE CASE

ROBERT A. GIANNASI Administrative Law Judge. This case was tried in Springfield Ohio on January 7 and 8 1988. The consolidated complaint alleges that Respondent refused to provide the Charging Party Union (the Union) with information relevant to the Union's bargaining obligation in violation of Section 8(a)(5) and (1) of the Act. The complaint also alleges that on two occasions Respondent violated Section 8(a)(1) of the Act by threatening its employees with layoffs if the Union persisted in seeking the above information and thereafter violated Section 8(a)(3) and (1) of the Act by laying off employees because of the Union's information request. The complaint further alleges that Respondent bypassed the Union and dealt directly with its employees in violation of Section 8(a)(5) and (1) of the Act. In its answer the Respondent denied the essential allegations of the complaint. The parties filed briefs which I have read and considered.¹

Based on the entire record including the testimony of the witnesses and my observation of their demeanor I make the following

FINDINGS OF FACT

I. THE LABOR ORGANIZATION

The Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE BUSINESS OF RESPONDENT

The Respondent a Wisconsin corporation with an office and place of business in Springfield Ohio is engaged in the interstate and intrastate transportation of motor vehicles. During a representative 1 year period Respondent derived gross revenues of \$50,000 from the transportation of vehicles from the State of Ohio directly to points outside Ohio. Accordingly I find and Respondent admits that it is an employer engaged in commerce within the meaning of Section 2(2) (6) and (7) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Facts

1. Background

Respondent is a subsidiary of the Jupiter Transportation System. It operates eight terminals including the Springfield terminal where the alleged unfair labor practices occurred. Respondent's major business at the Springfield terminal is shipping vehicles produced by Navistar International which has a facility nearby. From that location Respondent ships schoolbus chassis and truck cabs under two separate agreements with Navistar.

¹ After the hearing Respondent filed a motion for admission of exhibit. There was no objection and I grant the motion and make the exhibit part of this record.

The products are shipped under two separate methods. The driveaway method of shipment utilizes one truck cab to transport other cabs which are decked in a piggy back configuration. When a driver reaches his final destination and delivers the last cab, he flies back to Springfield. The truckaway method requires hauling schoolbus chassis on a trailer driven by an owner operator. After delivering a load, the owner operator obtains a return load or must return to Springfield empty.

The truckaway drivers who haul schoolbus chassis are paid a certain percentage of the gross revenues from Navistar for each unit hauled. The driveaway drivers who haul cabs are paid on a per mile basis. Sometimes because of particular needs or customer requests, truckaway drivers may haul cabs—driveaway work. When they perform driveaway work, the truckaway drivers are paid on a percentage basis.

The Union represents both types of drivers in Springfield. The Union and Respondent are signatories to the National Master Automobile Transporters Agreement and two supplemental agreements, one for driveaway work and the other for truckaway work. There are two separate methods of payment, grievance procedures and seniority lists depending on whether the work is driveaway or truckaway. The tariffs for the two methods of operation are also separate: so called 201 tariffs apply to driveaway work and 202 tariffs apply to the truckaway or owner operator work.

The Respondent has no obligation to assign driveaway work to truckaway driver under the collective bargaining agreement. The truckaway drivers may not pick trips from the driveaway board. If that were to happen, the Respondent might be subject to a grievance from the Union on behalf of the driveaway drivers; it represents. Indeed, at least one grievance of this type was filed and appears in the record.

In March 1986 Respondent won a bid to haul stripped chassis for Navistar out of its Springfield terminal. This required the hiring of some 22 owner operators to perform what is basically truckaway work. Respondent employed no driveaway drivers at this point in Springfield although it considers itself basically a driveaway operation nationwide.

On January 1, 1987 Respondent won a bid to haul additional vehicles for Navistar out of the Springfield terminal. This work had previously been performed by Howard Sober Incorporated (Sober). Most of this work was driveaway work although Sober employed both driveaway and truckaway drivers on separate seniority boards. Respondent took on 84 former Sober drivers including 13 owner operators. This required a merger of Respondent's 22 existing owner operators and 13 owner operators from the Sober operation to perform the truckaway work. All the truckaway drivers hauled bus chassis except that after receiving the new work from Navistar Respondent found that it was necessary to provide some overflow cab work to the owner operators.²

² The 13 former Sober owner-operators had historically hauled a considerable amount of driveaway work. However, when Respondent took over the work, it was not obligated to allocate the work the same way Sober did. It had the right to utilize driveaway drivers to do all the driveaway work.

In March 1987 the two truckaway seniority boards—that of the Respondent and that of Sober—were merged in accordance with a determination made by a joint management union arbitration board. The decision placed the 13 Sober owner operators below the Respondent's 22 owner operators on the seniority board. Because many of the former Sober drivers had worked for Sober for many years, the arbitration decision created a certain amount of tension. In addition, the former Sober owner operators suffered a significant reduction in rates because Respondent had lowered its rates to win the Navistar contract.

As indicated, when it won Sober's Navistar work Respondent took on a substantial amount of driveaway work in Springfield. It is cheaper to haul a unit under the driveaway method and Respondent prefers to ship its cabs under this method. However, at times a customer may request that a cab be transported by the truckaway method so that the vehicle does not accrue any road miles. In addition, a cab might be shipped by the truckaway method because of delivery time limitations. Nevertheless, there is no dispute that Respondent has the complete right to assign driveaway work and that the truckaway drivers are not entitled under their agreement to any driveaway work.

In early April Respondent saw the need to hire additional driveaway drivers. It acquired more chassis destination points and the Springfield drivers were being used by the Respondent for other trips in its system so they were delayed in returning to Springfield. As a result, the cab inventory in Springfield increased. Thereafter and through sometime in September 1987, the Respondent hired an additional 60 driveaway drivers. Some of these drivers were used elsewhere in the system.

2 The dispute between the parties

On January 8, 1987, Union Steward Gene Layne filed a grievance that protested the rates as presented on January 6, 1987 to all points. The grievance continued as follows:

Request to be paid 65% of the gross revenue charged by Dallas Mavis as provided for in Article 62, Section 4 of the National Automobile Transporters Agreement. Also request all drivers to be furnished the revenue charged on each trip dispatched on and a copy of the Tariff rate that will effect truckaway operation.

There is no evidence as to the disposal or resolution of this grievance.

On January 29, 1987 Respondent in apparent response to the above grievance posted two notices concerning rates. The first was a sample list of rates where the owners/operator may be required to take cab/chassis work. The notice continued: "You will also find a few long points the company may require low boy movement when we have back hauls available in the area." The notice also stated that prior to the time any driver is requested to move cab/chassis traffic by low boy on rates not shown below, he will receive a rate quote prior to dispatch. The notice also set forth Owner/Operator

Percentages The second notice set forth Chassis Rates to seven locations the Springfield drivers were assigned loads The notice stated This is the gross rate and the drivers would share in the gross rate by 65% The notice also provided figures for the gross charge as well as the broker's share³

On March 2, 1987, Union Business Representative Don Hager wrote a letter to Respondent's officials asking for a copy of the Tariff [sic] of the Traffic that is Transported from Springfield, Ohio, by the truckaway and driveaway operation. This is to include DMFC 201 and DMFC 202, 202A and any others that apply. There is a notation on the letter in evidence that a second request was made on April 9, 1987. Apparently the same letter was resubmitted to the Respondent on that date.

On April 3, 1987, Gene Layne, described as representing all brokers, filed a lengthy grievance asking for copies of company documents under Article 7, Section 3 of the NMATA, and stating that the owner operators were not being paid their rightful percentage of gross revenue. Layne used an example that was based on a 1986 tariff and noted that payment to owner operators was less than it had been under the Howard Sober operation. The grievance also stated as follows:

To the union's knowledge, D & M is a common and not a contract carrier and therefore the information should be public. If this understanding is mistaken, the union would also like to see documents establishing the contract nature of the work for each shipper. If D & M is of the opinion that the information sought is of a confidential nature, the union wishes substantiating documents for this claim. If satisfied, the union is willing to consider reasonable procedures under which the confidentiality could be maintained. Regardless whether it is confidential or not, the union is entitled to see all revenue information which determines the pay of its members.

In early May 1987, the above grievance was heard and decided by the Central Southern Conference Joint Arbitration Committee meeting in Rosemont, Illinois. The decision reports that Union Representative Hager presented the grievance at the hearing and stated that the Union does have the tariff rates and the owner operators are receiving 65% of those rates. The Committee ruled that the Company is not in violation of Article 64, Section 2 of the Central Southern Supplement.

Jupiter's executive vice president, Gordon Birdsall, had several meetings and conversations with Hager about the grievances and the request for information. One meeting apparently also included employee Layne, who had filed the grievance, although Layne did not testify about this meeting. The accounts of Hager and Birdsall differ. I credit Birdsall's testimony over that of Hager. I found Birdsall's testimony clearer, more direct, candid, and detailed. It also conforms more closely with the documentary evidence. For example, the resolution

of the Layne grievance supports Birdsall's testimony that the grievances were substantially resolved and a subsequent exchange of letters in the fall of 1987 confirms Birdsall's testimony that the parties had not until then resolved certain confidentiality concerns. Birdsall had raised with respect to the release of requested information.

Birdsall met with Hager and Layne on the grievance and told them that Respondent's rates were contract rates, not common carrier rates, as the Union previously thought. He also noted that the rates had already been posted, but he acknowledged the Union's need to verify the rates. In response to the request for information, Birdsall told Hager that he saw no need to verify the driveaway tariff because, according to Birdsall, there were about 20,000 rates and the Springfield owner operators only hauled about 3 percent of the driveaway work. Birdsall expressed a concern that the tariffs—whether truckaway or driveaway—might fall into the hands of competitors, thereby risking the loss of business. He also stated that release of the tariffs were covered under a confidentiality clause in Respondent's agreement with Navistar. Birdsall said that he needed to talk with Navistar officials before releasing confidential information. Nevertheless, Birdsall did offer to show union representatives the underlying tariffs at Respondent's offices in Kenosha, Wisconsin.

Representatives of the Union and Respondent met in Kenosha on June 11, 1987. In attendance, in addition to Birdsall and Hager, were Union Official Harry Geiseck, employees Roy Atha and Gene Layne, and Carl Van Dyke, another official of Respondent. Although all five testified to some extent about the meeting, the most detailed and reliable testimony comes from Birdsall.

At the Kenosha meeting, the union officials were given copies of the truckaway rates as well as the confidentiality clause in the Navistar agreement. The clause reads as follows:

12 Confidential Information

The Company and Carrier shall treat all information relating to business of the Company or the Carrier, including, without limitation, such matters as price, features, policies, inventories, channels of distribution, rates, and other matters relating to the *subject matter of this Agreement as confidential and privileged information*. Except as required by law, neither the Company nor the Carrier shall disclose such information to any person other than authorized personnel of the Company or the Carrier. Without limiting the foregoing, it shall be improper for carrier to reveal any of the terms of this Agreement other than this paragraph to another shipper or potential shipper or their known agent, except to the extent required by law. This duty shall survive termination or expiration of the Agreement.

The union officials were also shown the driveaway rates, which covered 113 pages. They did not ask for any specific driveaway rates, but they did ask for a copy of all the rates. Birdsall again protested, saying that the truckaway drivers only hauled this traffic on an over-

³ A driver may verify his pay by other methods. For example, the rate is provided on the driver's trip card and the actual rated freight bill [is] attached to his check.

flow basis and that there was no need for a copy of all the rates Birdsall said that if there was a question on any particular rate he would permit Hager access to the underlying information. The union officials did not accept this proposal although Hager stated that somewhere down the line the Union would have to have a copy of the rates because some of the drivers don't believe those are the actual rates. Birdsall then again expressed his fear that the rates might get into the hands of competitors and invoked the Navistar contract's confidentiality clause. There was no specific mention at this meeting of any offer by Hager or any other union official as to how the Union would keep the information confidential or how the parties could resolve the question of the Navistar confidentiality clause.⁴

Birdsall reminded the union officials that Respondent had no obligation to provide overflow driveaway work to truckaway drivers. He observed that he knew that the rates to the owner-operators had been lowered but he pointed out that this was necessitated by competitive factors. Birdsall then said [B]efore I can give you a copy of that if you persist until we can work this out I may not have—I may not be able to give you more trucks. This belongs to the driveaway board anyway.

On July 8, 1987, the Union filed an unfair labor practice charge alleging in effect that Respondent had threatened loss of job opportunities and layoffs at the June 11 meeting and that it had failed to provide wage information. A complaint issued on August 12, 1987, only on the failure to provide information. On September 8, 1987, another charge was filed by the Union.

After the June 11 meeting in Kenosha, Birdsall and Hager engaged in discussions which obviously resulted in a resolution of Birdsall's confidentiality concerns. On September 17, 1987, Hager wrote Birdsall the following letter:

This is my request for you to send to me the complete driveaway tariff rates in effect for Dallas Mavis Forwarding Company and Kenosha Auto Transport at Springfield, Ohio, for the transportation of vehicles from Navistar International to all points.

This information is needed to hopefully resolve the confusion and NLRB cases pending. Let me assure you and I commit to you that NO copies will be made of this and it will NOT leave my possession.

On October 9, 1987, Birdsall sent the following letter to Hager:

I am in receipt of a letter dated September 17, 1987, requesting a copy of our linehaul rates and

even though this is a confidential contract I am taking the liberty of filling your request based on your letter that you would keep the material in question confidential and make no copies of same nor will it leave your possession.

As I mentioned at our meeting in Kenosha on June 11, 1987, at which time we reviewed the bus chassis, our concern is two fold. First, the contract has a confidential clause with Navistar and a violation might occur which could place our relationship and contract in jeopardy should we show the rates to outside parties. Secondly, past experience has shown us that when rates have been copied and shown to third parties they have found legs and have fallen into the hands of our competition which has had a negative effect on our ability to seek increases at a later date and worse yet could allow our competition to view our rates which could result in a loss of business.

Nevertheless, in a spirit of cooperation I have decided to meet your request and will turn over the aforementioned rates to you in person on Monday, October 12, 1987.

The information was turned over to the Union as specified in Birdsall's letter.

B. The Request for Information

The General Counsel alleges that Respondent violated the Act by refusing from March 2 until October 12 to provide the Union with the underlying driveaway tariffs in the Respondent's contract with Navistar. The Respondent's position is threefold: (1) the Union's request was too broad in that it encompassed 20,000 tariffs, only a small percentage of which were applicable to the Springfield drivers; (2) the Respondent offered to supply the rates in response to specific complaints; and (3) it had a legitimate concern about the confidentiality of the rates.

As the General Counsel states, the Union wanted to verify the gross revenue figures previously provided to it because the Respondent's owner operators were entitled to be paid 65 percent of that figure. The truckaway drivers were concerned about the rates they were being paid and they had filed grievances over the matter. It seems apparent then that the information was relevant. It is well settled that the employer's duty to furnish information is triggered upon a union's showing a probability that the desired information [is] relevant and that it would be of use to the union in carrying out its statutory duties and responsibilities. *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 437 (1967). However, confidentiality claims may justify a failure to provide relevant information. *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979). Applying *Detroit Edison Co.*, the Board has held that

[I]n dealing with union requests for relevant but as assertedly confidential information, we are required to balance a union's need for such information against any legitimate and substantial confidentiality interests established by the employer, accommodating the parties' respective interests insofar as feasible in

⁴ I reject the General Counsel's contention (Br. 11) to the contrary. Hager was very unsure of himself when questioned on this point. I found his testimony ambiguous and confused. Indeed, he testified that at different times he told Birdsall that he would guard or handle confidential data as he had in the past. But he later said he did not believe he said what he would do to protect the confidentiality of the information. Only one other witness, Lane, testified that Hager made some assurances of confidentiality, but I believe his testimony is inconsistent with that of Hager and I reject it.

determining the employer's duty to supply the information. The accommodation appropriate in each individual case would necessarily depend upon its particular circumstances.

Minnesota Mining & Mfg Co 261 NLRB 27 30 (1982). The Board sometimes orders bargaining to resolve confidentiality concerns. *Id.* at 32. See also *E W Buschman Co v NLRB* 820 F.2d 206 208-209 (6th Cir. 1987).

I believe that the Respondent's confidentiality interests in this case outweighed the Union's need for the information at least to the point of justifying the Respondent's delay in providing the information until its confidentiality concerns were met.

Respondent was justifiably concerned that the Navistar tariffs would be generally revealed to the owner operators and thereafter fall into the hands of competitors. As Birdsall stated, past experience has shown us that when rates have been copied and shown to third parties they have found legs and have fallen into the hands of our competition. Hager had told terminal Manager John Webster that he wanted the rates to be furnished to all the owner operators so they could verify on each and every trip what the rates were. In addition, the Navistar contract prohibited the revelation of the rates to any unauthorized personnel. The Union was given a copy of the applicable confidentiality clause at the Kenosha meeting in June 1987. No concrete assurances of confidentiality were given by Hager at the Kenosha meeting. Indeed, at that point Birdsall had not yet talked to Navistar about revealing the tariffs to the Union. Finally, after further discussions and deliberations on September 17, Hager gave assurances of confidentiality in writing that were acceptable to Birdsall. The Respondent thereafter provided the information.

To be weighed against Respondent's legitimate confidentiality interest is the Union's need for the requested information. First of all, only a small percentage of the 20,000 tariffs would have affected the Springfield owner operators. They only performed driveaway work on an overflow or customer requested basis, and they only had need for a few of the tariffs. Indeed, they had previously been given the rates for the routes they ran, but the drivers who had previously worked for another company at a higher rate did not believe the information provided them. The Respondent offered to provide the underlying tariffs to resolve any specific disputes that might arise. Finally, some of the delay here was caused by the Union's inability to focus on exactly what it wanted. For example, the Union's latest grievance was rejected by the Joint Arbitration Committee in May 1987. It was only after the June 11 meeting in Kenosha that the parties focused on the desired information and the difficulties in obtaining it.

In balancing the competing interests, I have no difficulty in concluding that the delay in providing the underlying tariffs was justified by Respondent's legitimate concerns that the tariffs not be widely publicized so as to jeopardize its competitive position and its relationship with Navistar. During the hiatus between the original request and the Respondent's submission of the information, the parties were in continuous contact over the de-

tails as to how and under what circumstances the information would be provided. This seems to me to have been an appropriate way to proceed, and indeed the Board often orders bargaining to resolve confidentiality concerns. Accordingly, I find no violation of the Act in Respondent's conduct, and I shall dismiss the allegation that Respondent violated Section 8(a)(5) and (1) of the Act by failing to provide relevant information.

C. The Alleged Layoff Threats

The General Counsel alleges that Birdsall's statement at the June 11, 1987 Kenosha meeting about not being able to give you more trucks was an unlawful threat to lay off owner operators if the Union pressed its information request in violation of Section 8(a)(1). I disagree. Respondent did not threaten to lay off any owner operators. There was no threat that truckaway drivers would lose their truckaway work. Birdsall simply pointed out that the cab work belonged to the driveaway drivers and the truckaway drivers had no right to any cab work. Although the former Sober owner operators had performed a considerable amount of driveaway work, it is clear that Respondent was essentially a driveaway company and that it was going to use the cheaper driveaway method for most of this work. In context, I believe that Birdsall's remarks were meant simply to emphasize this point. Even if Birdsall's frustrated response to the Union's persistent and broad attempt to obtain all the driveaway tariffs could be viewed as a suggestion that less cab work would be assigned to owner-operators, he was saying that this might occur until his confidentiality concerns could be resolved. After all, Birdsall had to consult Navistar before turning over the information, and Hager gave him no concrete assurances that his confidentiality concerns would be met. Thus, in the context of all the discussions that had taken place on the issue, I do not believe that Birdsall intended his remarks as a threat of layoffs. Indeed, he contemplated resolution of the matter. Finally, the remarks were made in such an off-hand manner that I do not believe that they could have been viewed seriously by the employees present at the meeting.

The General Counsel also alleges as a threat of reprisal a statement allegedly made by Springfield Terminal Manager John Webster in July 1987 in a conversation with truckaway driver Clay Huddleston. Huddleston testified that Webster said, "you men must stop listening, letting one person making your decisions for you or talking for you because it will cost you your jobs because there's nothing we can't back and if the men insist on seeing the rates, then there will be layoffs because he'll have to hire 30 or 40 more men on the driveway to do the work because they're not going to let the truckaway haul the cabs if they persist." Huddleston replied, "[I]f the folks are in fact honest with us, why don't they just show us the rates and be finished with it?" According to Huddleston, Webster replied, "[T]hey are confidential. It's an agreement between Navistar and Dallas Mavis. They cannot show the rates and will not."

Webster's testimony about the conversation is different. He testified that Huddleston was on layoff status at

the time and was concerned because Respondent had been hiring driveaway employees Webster responded that Respondent was hiring driveaway employees because of a shortage in Springfield and elsewhere in the system and that this should not have an effect on truckaway work Webster said that it was Huddleston who brought up the issue of one individual he felt was stirring up trouble for all the rest of the owner operators and that this might be a cause for the owner operators having a lack of work The owner operators were getting less cab work at this point in part due to a seasonal slowdown and in part due to the merged truckaway seniority list and an increased number of driveaway drivers In any event Webster told Huddleston that he should not let one individual do the talking for him if it was going to cause him problems

On balance I am inclined to credit Webster that what ever he said was in response to Huddleston's fears that there was insufficient truckaway work to avoid a layoff and that Huddleston was concerned that the overflow driveaway work would go to newly hired driveaway drivers In this context it seems to me that Webster's remarks were simply a reflection of Respondent's right to use and indeed hire new driveaway drivers to ship the cabs rather than to ship them through the truckaway drivers Moreover even assuming Webster's remarks could have been interpreted as suggesting a loss of driveaway work if the owner operators persisted in their information request I believe that the suggestion was made in the context of Respondent's confidentiality concerns Thus as in my analysis of Birdsall's remarks I believe that Webster's remarks could be viewed as a desire to avoid conflicts while Respondent's confidentiality concerns were being addressed

In short the statements of both Birdsall and Webster were made in the context of explaining Respondent's concern over the confidentiality issue There were no threats that truckaway drivers would lose their traditional work At most the statements implied that pending resolution of the confidentiality issue further assignment of overflow work to truckaway drivers might complicate the dispute which after all was being resolved through negotiations Moreover the circumstances under which the statements were made—one in a bargaining session and the other in a discussion where the employee raised the issue of loss of work—created an aura of ambiguity In these circumstances I do not believe that the statements were intended or viewed as threats that the truckaway drivers would be laid off if they engaged in protected concerted activity in violation of Section 8(a)(1) of the Act

D The Direct Dealing Allegations

The General Counsel alleges that on August 20 1987 and again a week or so later Respondent's agents sought to deal directly with employees in contravention of the duty to bargain only with the Union that represented the employees To establish the August 20 violation the General Counsel relies on the testimony of Robert Armentrout Jupiter's vice president of Navistar field operations He spoke with a group of truckaway drivers at the Springfield terminal before they were to leave on

trips to Allentown He asked the drivers if they would sign a letter stating they were satisfied with the rates and the trips that they were dispatched [on] that afternoon The drivers refused to sign such a document He later brought the drivers to his office where he called Vice President Birdsall who spoke to the drivers on a speaker phone He asked them if they were being forced to take the trips The drivers said they were not Birdsall also asked whether the drivers were satisfied with the rates They did not answer He then said that he wanted to make sure that the drivers were happy and wanted to take the trips The drivers said they wanted to take the trips

To establish the second violation the General Counsel relies on the testimony of Union Business Representative Harry Gieseck and employees Bill Standley Clarence Smith and Robert Hall Essentially their testimony is as follows One morning in late August Terminal Manager Webster approached them and asked them to sign a statement that they were satisfied with the rates they were being paid on that trip Gieseck who came on the scene in the middle of this discussion intervened and said that the drivers were not going to sign any statements

Although he gave it a different cast Webster does not dispute the above account He testified that a group of owner operators was assembled at the Springfield terminal on the morning in question because the Union was having a steward's election Webster told them that he did not have many trips for them but that he would have a dispatch in the afternoon One person asked if Webster could give them cab loads Webster explained that he did not have any cab loads but that if he gave them any he had to request that they sign a document that they were being made aware of the rate prior to dispatch and that they were pulling that trip on a voluntary basis However Webster conceded that the owner operators were not complaining about being forced to take driveaway loads they were complaining about their rates of pay

An employer is obligated to bargain with the union that represents its employees over terms and conditions of employment This obligation is exclusive and exacts the negative duty to treat with no other *Medo Photo Supply Corp v NLRB* 321 US 678 683-684 (1944) Thus an employer may not bypass a recognized union and deal directly with employees See *Goodyear Aerospace Corp* 204 NLRB 831 (1973) *enfd* in pertinent part 497 F.2d 747 (6th Cir 1974) and *Admiral Merchants Motor Freight* 264 NLRB 54 57-59 (1982)

Respondent's meetings with truckaway drivers for the purpose of having them sign statements saying they were happy with their rates and suggesting that they would not be given assignments until they did constituted unlawful direct dealing The Union's information request was still pending and the parties were still bargaining over the issue of confidentiality The truckaway drivers had filed grievances over their rates and were still complaining about them They had chosen to resolve the matter through their Union and through the contractual grievance procedure There is no evidence that Respond

ent suggested the procedure it presented to the employees directly to the Union. Indeed the evidence shows that union representatives objected to having the employees sign anything about their rates. On one occasion the employees were brought into the office and made to talk to Birdsall. The thrust of Respondent's efforts on both occasions was not to avoid forcing runs on the truckaway drivers but to diffuse possible criticism of the rates. Yet this was the very issue that they had chosen to pursue through their union. In these circumstances I find that Respondent's conduct amounted to a bypass of the Union and was thus violative of Section 8(a)(5) and (1) of the Act.

E. *The Layoffs of the Truckaway Drivers*

On August 29, 1987, the Respondent laid off 25 owner operators. Five of these drivers were recalled on September 8, but they and five additional drivers were laid off again on September 10. Respondent recalled 15 drivers on September 18 and the remaining 15 on September 21.

The complaint alleges that Respondent laid off the truckaway drivers in late August and early September 1987 because they concertedly requested information concerning the rates being charged to Respondent's customers through their union. The General Counsel thus asserts that the layoff was discriminatory within the meaning of Section 8(a)(3) and (1) of the Act. Respondent denies the assertion of discrimination and alleges that the layoffs were caused by economic reasons. In its view truckaway drivers are not entitled to driveaway work which can be hauled more economically under the driveaway method.

As a threshold matter, however, Respondent alleges (Br. 33) that the allegations concerning the discriminatory layoffs should be deferred to the grievance and arbitration procedures set forth in the collective bargaining agreement. The collective bargaining agreement of the parties provides that "unless otherwise expressly provided in this Agreement, any and all disputes, including interpretation of contract provisions, shall be subject to the grievance procedure of the Agreement." It appears moreover that five truckaway drivers filed grievances alleging that the layoffs were improper. Some of the grievances alleged that the layoffs occurred because the drivers refused to sign letters saying they were happy with the rates. The Union has apparently held these grievances in abeyance pending the resolution of this proceeding. However, Respondent is willing for these grievances to go forward.

In *United Technologies Corp.*, 268 NLRB 557 (1984), the Board modified its earlier deferral policy to include deferral to arbitration even in 8(a)(3) and (1) cases. However, the Board did not alter its view that it will not defer in cases where the employer's conduct arguably constitutes a rejection of the principles of collective bargaining. *Id.* at 560. Thus, the Board presumably still adheres to the rule—which constitutes an exception to its deferral policy—that a threat of reprisal for participation in the grievance procedure strikes at the foundation of the grievance arbitration procedure that is at the heart of the deferral policy. *North Shore Publishing Co.*, 206

NLRB 42-43 (1973) citing *Joseph T. Ryerson & Sons*, 199 NLRB 461 (1972).

In the instant case, the General Counsel's allegations, if true,⁵ would show retaliation against employees because they undertook through their union to seek information relevant to verifying contractual rates of pay. The allegation suggests discrimination for enforcing the contract that Respondent seeks now to invoke. Thus, under the *Ryerson* exception, deferral would not be appropriate in this case. Moreover, the allegation of discrimination is closely related to other allegations—the unlawful refusal to provide information and the unlawful threats and direct dealing—which Respondent concedes should be decided on the merits. In such situations, the Board, in the interest of decisional efficiency, does not defer piecemeal and decides the entire case. See *SQI Roofing*, 271 NLRB 1 fn. 3 (1984), cited with approval in *Burroughs Credit Union*, 280 NLRB 292 fn. 3 (1986). In these circumstances, I do not believe that it is appropriate to defer the layoff issue to the parties' grievance procedure as Respondent contends. I shall therefore address the issue on the merits.

Turning to the merits, there is no dispute that truckaway work itself was down and justified a layoff. However, the General Counsel contends that the truckaway drivers were entitled to haul cabs that is, perform driveaway work, which was plentiful at this time. The General Counsel points out that no driveaway drivers were laid off and indeed some new driveaway drivers were hired at this time. Also significant is evidence—which is undisputed—that at the time of the layoff, Respondent offered to permit the laid-off owner operators to perform driveaway work off the driveaway board and even offered to train them under the driveaway method if necessary.

The General Counsel alleges that the evidence in support of its other allegations—some of which were dismissed—support a finding of animus, namely that Respondent objected to the Union's attempt to verify the rates the owner operators were paid. From this evidence, the General Counsel asks me to make an inference that it laid off the owner operators because of this animus. Some of the evidence is equivocal. As I have indicated, Respondent had serious confidentiality concerns that explained some of its statements. I have dismissed these allegations of illegality. However, other evidence supports the General Counsel's case. Shortly before the layoffs, the Respondent dealt directly with the owner operators in an effort to blunt complaints about their rates of pay. While this shows Respondent's concern over the truckaway driver's complaints about their rates of pay, I am not sure it shows an inclination on the part of Respondent to punish the owner operators because they were seeking to verify the rates through the Union as the complaint alleges. In any event, there appears to be some evidence of animus or at least concern over the Union's information request.

⁵ Deferral issues must be decided before reaching the merits. *Transport Service Co.*, 282 NLRB 111 fn. 4 (1986).

To be weighed against the above evidence are the explanations for the decrease in work for the truckaway drivers. The documentary evidence clearly shows that the truckaway work decreased dramatically shortly before the layoffs. There was driveaway work available but Respondent had good reason to use the driveaway method to deliver it. Historically when they worked for Sober the truckaway drivers obtained a significant amount of overflow driveaway work. However when Respondent took over that work began to dry up. Thus the General Counsel is correct when she asserts that truckaway drivers hauled increasingly less cabs as 1987 progressed. Basically the number fluctuated from a high of 128 in February to a low of zero in July. There was ample basis for this diminution in driveaway work for truckaway drivers. Respondent decided to expand its driveaway work force in anticipation of more cab work and also in recognition that the driveaway method of delivering cabs was cheaper. The hiring decision was made in April and implemented over the next several months.

The General Counsel's case essentially requires a finding that Respondent decided to expand its driveaway work force or utilize driveaway drivers to haul cabs because it resented the Union's request for information. I cannot plausibly make such a finding in view of the solid economic reasons behind the determination to use the driveaway method to deliver cabs. Respondent generally utilizes driveaway drivers to haul cabs and truckaway drivers to haul chassis. There is no dispute that Respondent has complete authority to determine the method of shipping cabs and the driveaway method was less costly. Respondent's offer to permit the truckaway drivers to utilize the driveaway method effectively refutes a discriminatory motive for the layoffs in this case. More over it appears that most of the complaints about rates of pay came from the former Sober drivers. Their dissatisfaction derived in great part from the fact that they received less work. However this was caused primarily by the arbitration decision that placed them at the bottom of the truckaway seniority list. Thus the Sober drivers were not going to get the same amount of driveaway work under Respondent as they did under Sober. In these circumstances I have considerable doubt whether the General Counsel has established that a reason for the layoff was the Union's request for information.

However even if I could find that the General Counsel had established that a reason for the layoffs was retaliation for the owner operator's support of the Union's attempt to verify the driveaway rates, I also find that Respondent would have laid off the owner operators even in the absence of any protected concerted activity. In view of the economic advantages of utilizing the cheaper driveaway method for the delivery of cabs and Respondent's policy of using driveaway drivers to haul cabs and truckaway drivers to haul chassis, I have no doubt that Respondent would have laid off the truckaway employees when they ran out of bus chassis work even had there been no attempt by the Union to verify the driveaway rates. I shall therefore dismiss this allegation of the complaint.

CONCLUSIONS OF LAW

1 The Union is the exclusive bargaining representative of the employees in the following appropriate unit

All truck drivers and mechanics employed by Respondent at its Springfield Ohio terminal excluding all office clerical employees professional employees guards and supervisors as defined in the Act

2 By passing the Union and dealing directly with represented employees Respondent violated Section 8(a)(5) and (1) of the Act

3 The above violation is an unfair labor practice affecting commerce within the meaning of Section 2(6) and (7) of the Act

4 Respondent has not otherwise violated the Act

On these findings of fact and conclusions of law and on the entire record I issue the following recommendation⁶

ORDER

The Respondent Dallas & Mavis Forwarding Company Inc Springfield Ohio its officers agents successors and assigns shall

1 Cease and desist from

(a) Bypassing the Union and dealing directly with employees over wages hours and terms and conditions of employment

(b) In any like or related manner interfering with restraining or coercing employees in the exercise of their Section 7 rights

2 Take the following affirmative action necessary to effectuate the policies of the Act

(a) On request bargain collectively and in good faith with the Union over wages hours and terms and conditions of employment in the following appropriate unit

All truck drivers and mechanics employed by Respondent at its Springfield Ohio terminal excluding all office clerical employees professional employees guards and supervisors as defined in the Act

(b) Post at its Springfield Ohio terminal copies of the attached notice marked Appendix ⁷ Copies of the notice on forms provided by the Regional Director for Region 9 after being signed by the Respondent's authorized representative shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Rea

⁶ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations the findings conclusions and recommended Order shall as provided in Sec. 102.48 of the Rules be adopted by the Board and all objections to them shall be deemed waived for all purposes

⁷ If this Order is enforced by a judgment of a United States court of appeals the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board"

sonable steps shall be taken by the Respondent to ensure that the notices are not altered defaced or covered by any other material

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply

IT IS FURTHER ORDERED that the unfair labor practice allegations not sustained here be dismissed

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice

WE WILL NOT bypass the Union and deal directly with employees over wages hours and terms and conditions of employment

WE WILL NOT in any like or related manner interfere with restrain or coerce employees in the exercise of their Section 7 rights

WE WILL on request bargain collectively and in good faith with General Teamsters Sales and Service and Industrial union Teamsters Local 654 affiliated with the International Brotherhood of Teamsters Chauffeurs Warehousemen and Helpers of America AFL-CIO over wages hours and terms and conditions of employment in the following appropriate unit

All truck drivers and mechanics employed by Respondent at its Springfield Ohio terminal excluding all office clerical employees professional employees guards and supervisors as defined in the Act

DALLAS & MAVIS FORWARDING COMPANY INC